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IN THE

Supreme Court of the United States

October Term, 1942.

No. 875 56

THE ATLANTIC REFINING COMPANY, Owner of the Tank Steamship "BOHEMIAN CLUB",

Petitioner,

v.

A. P. MOLLER, Claimant of the Motor Vessel "LAURA MAERSK".

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

OTTO WOLFF, JR.,
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Proctor for Petitioner.

International, 236 Chestnut St., Philadelphia

TABLE OF CONTENTS OF PETITION.

	Page
1. Jurisdiction	1
2. Summary statement of the issues involved	2
3. The opinions of the Court below	4
(a) The District Court	4
(b) The Circuit Court of Appeals	4
4. The questions presented	5
5. Reasons relied on for the allowance of the writ	5
6. Prayer for writ of certiorari	6
7. Certification	7

STATUTES CITED IN PETITION.

	Page
1. Judicial Code, Sec. 240 (a); 43 Stat. 938; U. S. C. Title 28, Sec. 347	1
2. Act of March 3, 1899; 30 Stat. 1152; U. S. C. Title 33, Sec. 409	4

CASES CITED IN PETITION.

	Page
The City of Norfolk, 266 Fed. 641	5
The Socony No. 9, 74 Fed. (2d) 233	6

TABLE OF CONTENTS OF BRIEF.

	Page
1. Opinions of the Courts below	9
2. Jurisdiction of the Court	9
3. Statement of the case	10
4. Specifications of error	10
5. Argument	11
6. Appendix. Act of March 3, 1899, c. 425, sec. 15, 30 Stat. 1152; U. S. C. Title 33, Sec. 409	27

STATUTES CITED IN BRIEF.

	Page
Judicial Code, Sec. 240 (a); 43 Stat. 938; U. S. C. Title 28, Sec. 347	10
Act of March 3, 1899; 30 Stat. 1152; U. S. C. Title 33, Sec. 409	11, 16, 17
Inland Rules of Navigation, Art. 25; 30 Stat. 101; U. S. C. Title 33, Sec. 210	22

TABLE OF CASES CITED IN BRIEF.

	Page
The A. P. Skidmore, 115 Fed. 791 (C. C. A. 2)	16
The Battler, 72 Fed. 537 (C. C. A. 3); cert. den. 163 U. S. 697	16
Belden v. Chase, 150 U. S. 674	19
The Caldy, 123 Fed. 802 (D. of Md.), affirmed 153 Fed. 837 (C. C. A. 4)	12
The City of Birmingham, 137 Fed. 555 (C. C. A. 2); cert. den. 199 U. S. 607	13, 15
The City of Norfolk, 266 Fed. 641 (C. C. A. 4); cert. den. 253 U. S. 491	13, 14, 15
The Chattahoochee, 173 U. S. 540	19
The Clarence L. Blakeslee, 243 Fed. 365 (C. C. A. 2)	16
The Europe, 190 Fed. 475 (C. C. A. 9)	12
The Garden City, 127 Fed. 298 (C. C. A. 6)	16
The Itasca, 117 Fed. 885 (S. D. Ga. E. D.)	13
The Lehigh, 15 Fed. Supp. 425; aff. 84 Fed. (2d) 1002 (C. C. A. 2)	13, 15
The Limon, 35 Fed. (2d) 730 (C. C. A. 1)	13
The Socony No. 9, 74 Fed. (2d) 233 (C. C. A. 2)	13, 15
The Southern Cross, 93 Fed. (2d) 297 (C. C. A. 2)	13
The Vera, 226 Fed. 369 (C. C. A. 1)	13
The Welcombe, 19 Fed. Supp. 874 (E. D. N. Y.)	13

IN THE

Supreme Court of the United States.

No. . October Term, 1942.

THE ATLANTIC REFINING COMPANY, OWNER OF THE TANK STEAMSHIP "BOHEMIAN CLUB",

Petitioner,

v.

A. P. MOLLER, CLAIMANT OF THE MOTOR VESSEL "LAURA MAERSK".

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Atlantic Refining Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled cause on March 17, 1943 (R. p. 134).

JURISDICTION.

The judgment of the Circuit Court of Appeals was first entered on October 21, 1942; a petition for rehearing was granted on December 3, 1942; the judgment of the Court confirming its judgment of October 21, 1942, was entered on March 17, 1943. This petition was filed April 29, 1943.

The cause is one of collision, civil and maritime, in which the jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; 28 U. S. C. 347.

SUMMARY STATEMENT OF THE ISSUES INVOLVED.

On December 20, 1939, the Tanker "BOHEMIAN CLUB", owned and operated by your petitioner, while proceeding up the channel of the Delaware River encountered a dense fog which blotted out all indicia of position. Being then unable to proceed, she was anchored at 7.41 A. M. Shortly after 10 A. M. the fog lifted sufficiently to enable those in charge of her navigation to observe, for the first time, that the Flash Buoy, known as 2-D, on the easterly side of the channel limits, at the intersection of the Bulkhead Bar and the Deepwater Point Ranges, was off the vessel's starboard bow, at an angle of about 45 degrees and about 150 feet distant. The tide was then ebb, but was due to change to flood in about 2 hours. Realizing that if compelled to remain at anchor where he was, his vessel would be in danger of fouling the buoy in swinging with the tide when it changed from ebb to flood, the master of the "BOHEMIAN CLUB" lifted his anchor and inaugurated manoeuvres with the intention of drifting down stream with the tide, and away from the Buoy, to a position of greater safety. At 10.18 A. M., however, and before completing his manoeuvres, a sudden redescent of the fog which again blotted out the Buoy 2-D and left him without any indicia of position, compelled him to anchor where he was. The fog continued, and the "BOHEMIAN CLUB" remained at anchor, until about 11.37 A. M., when she was in collision with the Danish Motor Vessel "LAURA MAERSK."

The "LAURA MAERSK" had been proceeding down the Delaware River at varying speeds of from 13 to 18 knots an hour, and those in charge of her navigation were not aware of the presence of the "BOHEMIAN CLUB" until they saw her loom up out of the fog about 5 degrees off their

port bow, and about 500 feet distant. Before the "LAURA MAERSK" could be brought to a stop she collided with the anchored "BOHEMIAN CLUB", almost head on. Both vessels sustained serious damage.

When the "BOHEMIAN CLUB" lifted her anchor, preparatory to shifting away from the Buoy 2-D, she was anchored in the channel of the Bulkhead Bar Range section of the river, on the easterly side of the range line, and had steadied on a heading of approximately 30 degrees. At the time of the collision, as those in charge of her navigation subsequently learned, her bow was on the range line, with her stern tailing to the westward, and her heading between 26 to 30 degrees. The course up the Bulkhead Bar Range is 9 degrees; the angle between the Bulkhead Bar Range and the Deepwater Point Range is 34 degrees; the channel of the Delaware River, on the Bulkhead Bar Range, is 1200 feet wide—400 feet wide to the eastward of the range line, and 800 feet wide to the westward thereof.

The facts as stated above are the facts as found by the learned trial Judge of the District Court (Opinion, Findings of Fact and Conclusions of Law; R. p. 103) and were accepted by the Circuit Court of Appeals as the facts in the case (Opinion, R. p. 115).

The Atlantic Refining Company, as owner of the "BOHEMIAN CLUB", filed a libel against the "LAURA MAERSK", *in rem*, in the United States District Court for the Eastern District of Pennsylvania, claiming damages in the sum of approximately $40,000.00. A. P. Moller, Managing Owner of the "LAURA MAERSK", filed a Cross-Libel against the "BOHEMIAN CLUB", *in rem*, and against the Atlantic Refining Company, *in personam*, claiming damages in the sum of approximately $15,000.00.

THE OPINIONS OF THE COURTS BELOW.

(a) The District Court.

The District Court held (R. p. 103) that the collision was due solely to the fault of the "LAURA MAERSK", and entered an Interlocutory Decree (R. p. 113) wherein it awarded The Atlantic Refining Company, your petitioner, the full amount of its damages, with interest and costs, and dismissed the cross-libel of the claimant of the "LAURA MAERSK", with costs.

(b) The Circuit Court of Appeals.

The three judges of the Circuit Court of Appeals affirmed the finding of the District Court that the "LAURA MAERSK" was at fault; but the majority of the Court were of the further opinion that the "BOHEMIAN CLUB" was guilty of a contributing statutory fault in that she had violated the provisions of the Act of March 3, 1899, c. 425, Sec. 15, 30 Stat. 1152; 33 U. S. C. Sec. 409, which provides that it shall be unlawful for a vessel to anchor in the navigable channel of a river in such a manner as to prevent or obstruct the passage of other vessels (R. p. 115). The dissenting Judge filed a dissenting opinion (R. p. 122). The Court, accordingly, entered a judgment on October 21, 1942 (R. p. 124), whereby it reversed the decree of the District Court, with costs, and remanded the cause to the District Court for further proceedings in accordance with the opinion of the Circuit Court of Appeals.

A rehearing was granted by the Circuit Court of Appeals on the petition of your petitioner; and in the opinion filed by them sur rehearing (R. p. 130) the majority of the Court reaffirmed their previous conclusion that the "BOHE-

MIAN CLUB" was guilty of a statutory fault, and the dissenting Judge reiterated his previous dissent (R. p. 132). On March 17, 1943, the Court entered a judgment (R. p. 134) whereby it confirmed its prior judgment of October 21, 1942.

THE QUESTION PRESENTED.

Is a navigator, who is compelled to anchor his vessel, because of fog, in the navigable channel of a river, and who, upon ascertaining during a temporary lift in the fog that his position is one of danger, inaugurates a manoeuvre to place his vessel in a position of greater safety, but who, before completing his manoeuvre, is again compelled to anchor because of a sudden redescent of the fog which blots out all indicia of position, and who thereupon anchors his vessel in a position where, unknown to himself at the time, she obstructs the passage of other vessels on that side of the channel in which she is anchored, guilty of a violation of the Act of Congress approved March 3, 1899?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The majority of the Circuit Court of Appeals have rendered a decision under a Federal statute which has never been, but which should be, interpreted by this Court in the public interest, and as a matter of paramount importance to all navigators.

2. The majority of the Circuit Court of Appeals have rendered a decision involving the interpretation and application of a Federal statute in a way which is probably in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *The City of Norfolk*, 266 Fed. 641,

and with the decision of the Circuit Court of Appeals for the Second Circuit in *The Socony No. 9*, 74 Fed. (2d) 233.

3. In holding the master of the "Bohemian Club" guilty of a statutory fault, the majority of the Circuit Court of Appeals announced a rule of navigation which is unsupported by authority, and which, in the opinion of the dissenting Judge of that Court is (1) a "very novel rule", (2) a rule which "misinterprets the Act of March 3, 1899", and (3) a rule which "renders navigation more difficult".

4. In holding the master of the "Bohemian Club" guilty of a statutory fault, the majority of the Circuit Court of Appeals have interpreted the Act of Congress approved March 3, 1899, in a manner which is not only unsupported by authority, and renders navigation more difficult, but which is contrary to the intendment of the Act, is opposed by every consideration of reason, and will be conducive to marine disasters in that it must necessarily lead to hesitation, doubt and indecision on the part of a navigator when confronted with a similar situation of danger.

PRAYER FOR WRIT OF CERTIORARI.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of your Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit requiring that Court to certify and send to this Court for review and determination on a day certain to be named therein a full and complete transcript of the Record and proceedings in the case numbered on its docket No. 7970, and entitled The Atlantic Refining Company, owner of the Tank Steamship "Bohemian Club", libellant-appellee, v. Motor Vessel

"LAURA MAERSK", her engines, tackle, apparel, etc., A. P. Moller, claimant-appellant; and A. P. Moller, Managing Owner of the Motor Vessel "LAURA MAERSK", cross-libellant-appellant, v. Tank Steamship "BOHEMIAN CLUB", her engines, tackle, apparel, etc., The Atlantic Refining Company, claimant-appellee; and that the decree of the United States Circuit Court of Appeals for the Third Circuit in this case may be reversed by your Honorable Court, and that your petitioner may have such other and further relief in the premises as may be just. And your petitioner will ever pray, etc.

THE ATLANTIC REFINING COMPANY,

By OTTO WOLFF, JR.,
Proctor for Petitioner.

CERTIFICATION.

I hereby certify that I am a member of the Bar of the Supreme Court of the United States; that I am Proctor for The Atlantic Refining Company, the petitioner herein; that the foregoing petition has been prepared in accordance with the request of the petitioner; that the allegations in said petition are true to the best of my knowledge, information and belief; that said petition is not made for the purpose of delay or prolongation of litigation; and that in my opinion said petition is well founded in law and in fact, and should be granted.

OTTO WOLFF, JR.

IN THE SUPREME COURT OF THE UNITED STATES.

No. . OCTOBER TERM, 1942.

THE ATLANTIC REFINING COMPANY, OWNER OF THE TANK STEAMSHIP "BOHEMIAN CLUB",
Petitioner,

v.

A. P. MOLLER, CLAIMANT OF THE MOTOR VESSEL "LAURA MAERSK".

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion, findings of fact and conclusions of law of the United States District Court for the Eastern District of Pennsylvania (R. p. 103) filed under date of September 10, 1941, are reported in 40 Fed. Supp. 641.

The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. p. 115) was filed on October 21, 1942; the opinion of the Court sur rehearing (R. p. 130), was filed March 17, 1943. Neither of these opinions has as yet been reported.

II.

JURISDICTION.

1. The date of the judgment entered herein by the United States Circuit Court of Appeals for the Third Circuit is March 17, 1943.

2. This is a proceeding within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

3. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, United States Code, Title 28, Section 347.

III.

STATEMENT OF THE CASE.

A statement of the case appears in the petition (*ante* p. 2) and a restatement of the same is here omitted in the interest of brevity.

IV.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals for the Third Circuit erred in reversing the decree of the District Court of the United States for the Eastern District of Pennsylvania.

2. The Circuit Court of Appeals for the Third Circuit erred in holding that the master of the "BOHEMIAN CLUB" was guilty of a statutory fault.

3. The Circuit Court of Appeals for the Third Circuit erred in holding that the position in which the "BOHEMIAN CLUB" was anchored at the time of the collision was a violation of a statutory rule which cannot be justified by a necessity for anchoring resulting from her change of position in foggy weather.

V.

ARGUMENT.

Point I.

The Conclusion of the Majority of the Court Below That the Master of the "Bohemian Club" Was Guilty of a Statutory Fault Is Contrary to the Intendment of the Act of March 3, 1899, Is Unsupported by Authority, Is In Conflict With the Liberal Interpretation Placed Upon the Act by the Federal Courts, Without Exception, and Is Opposed by Every Consideration of Reason.

The Act of March 3, 1899, c. 425, Sec. 15, 30 Stat. 1152; 33 U. S. C. 409, is set out in full in the Appendix hereto attached. The provision of the Act relevant to this proceeding reads as follows:

> "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft * * *"

The question presented is whether the provisions of the Act of March 3, 1899, are so rigorous and inexorable that a navigator who is compelled to anchor in the channel of a river, because of fog, must remain where he is, notwithstanding that he subsequently finds his position to be one of danger, and can venture to move his vessel to a position of safety only at the peril of being found guilty of a statutory fault, if, through circumstances beyond his control, he is again compelled to anchor, before completing his manoeuvers, at a point where his vessel is, allegedly, more of an obstruction to other vessels than she had previously been. It is our contention that such an interpretation of the Act is contrary to the legislative intent; is un-

supported by authority; is in conflict with the liberal interpretation placed upon the Act by the Federal courts, without exception; and is opposed by every consideration of reason. Yet it was precisely upon such an interpretation of the Act that the majority of the Court below based their conclusion that the master of the "BOHEMIAN CLUB" had been guilty of a statutory fault. It is because of the far reaching consequences of that decision, as hereinbelow set forth, that we respectfully submit this case should be reviewed by your Honorable Court on certiorari.

In *The Caldy*, 123 Fed. 802 (D. of Md.), affirmed 153 Fed. 837 (C. C. A. 4), the District Court, referring to the Act of March 3, 1899, said:

> "Unquestionably, the Act of Congress being in aid of commerce and navigation should receive a sensible construction to further that end, * * *. So far as concerns the liability in case of collision, the statute probably only emphasizes the previously existing maritime law. It has always been held a fault to so anchor a vessel as to unnecessarily and negligently obstruct a navigable channel. Spencer on Collisions, Sec. 152."

The words "prevent or obstruct" as used in the Act, have been held to connote limited restraint, rather than an absolute or complete prohibition: *The Europe*, 190 Fed. 475 (C. C. A. 9); *The Caldy, supra* (C. C. A. 4); and in interpreting the Act the Federal courts, without exception, have adopted a liberal rule of construction, and have held that if a vessel can justify herself for anchoring in the channel of a navigable river, notwithstanding that she may be anchored in such a manner as to prevent or obstruct the passage of other vessels, she is without fault for doing so:

The City of Norfolk, 266 Fed. 641 (C. C. A. 4) Cert. den. 253 U. S. 491;
The Socony No. 9, 74 Fed. (2d) 233 (C. C. A. 2);
The City of Birmingham, 138 Fed. 555 (C. C. A. 2); Cert. den. 199 U. S. 607;
The Lehigh, 15 Fed. Supp. 425; aff. 84 Fed. (2d) 1002 (C. C. A. 2);
The Southern Cross, 93 Fed. (2d) 297 (C. C. A. 2);
The Limon, 35 Fed. (2d) 730 (C. C. A. 1);
The Vera, 226 Fed. 369 (C. C. A. 1);
The Welcombe, 19 Fed. Supp. 874 (E. D. N. Y.);
The Itasca, 117 Fed. 885 (S. D. Ga. E. D.).

In *The City of Norfolk, supra*, the Circuit Court of Appeals for the Fourth Circuit, in construing the Act said (italics supplied):

> "If the fog is so dense as to justify the master in believing that another vessel going *at a moderate speed* could not be seen at the distance in which he could stop his vessel, and that the two vessels would be in danger of collision, then the master should anchor and give the statutory signals. *Even if he thus obstructs the channel, he is not responsible, because it is done under necessity.* Doubt as to this necessity should be solved by weighing all the circumstances and conditions • • •. If the navigator of the vessel, upon careful consideration of all the circumstances reasonably concludes that necessity requires anchorage *he should not be held in fault*, and in case of collision should be held *entitled to the presumption in favor of the vessel at rest against a moving vessel.*"

Similarly, in *"The Socony No. 9"*, *supra*, the Circuit Court of Appeals for the Second Circuit held (italics supplied):

"It is quite true that the general duty of a vessel not to anchor in a fairway (Section 409, title 33, U. S. Code), exists in a fog as well as at any other time. La Bourgogne, 86 Fed. 475 (2 C. C. A.); The Persian, 181 Fed. 439 (2 C. C. A.). But like most duties, *it is not absolute;* she may have an interest *which will excuse her;* for example, *the fog may be so dense,* the quarters so close, and a safe berth so difficult and dangerous to reach, that the balance of advantage to all concerned *makes it best to anchor where she is.* In the case at bar it was theoretically possible for the tugs to try for some Staten Island slip nearby. When questioned, the master of the Joyce Card, who was in charge, would only answer that 'with that draft of water we can't go into every pier', and that it seemed safer for his own vessel to stay where he was. *That was not a very convincing excuse,* and yet we are disposed *to accept his judgment made at the time,* under the doctrine of A. P. Skidmore, 115 Fed. 791 (C. C. A. 2); City of Norfolk, 266 Fed. Rep. 641, 645, (C. C. A. 4) and the Northern Queen, 117 Fed. 906. * * *"

"The choice was doubtful whatever it was, and there is no such clear weight against the master's judgment, *made on the spot,* as to charge his vessels."

Referring to the foregoing decision in the *City of Norfolk,* the majority of the Court below said (italics supplied):

". . . the Court did say that if a fog becomes so dense that a vessel cannot move safely then she should anchor and give the statutory signals and that, '*Even if he (the master) thus obstructs the channel, he is not responsible, because it is done under necessity.*' Actually *the latter observation was a dictum.*"

and in referring to the decision in the *Socony No. 9, supra,* the majority of the Court below held that it was distinguishable on its facts, and said:

"While the tanker as anchored in the Socony case did obstruct ferries coming into the rack, it did not constitute an obstruction to the tug which actually collided with her in the fog."

Having thus reached the conclusion that the decisions of the Circuit Court of Appeals for the Fourth Circuit in the *City of Norfolk, supra,* and for the Second Circuit in the *Socony No. 9, supra,* were not applicable, the majority of the Court below then held that since the "BOHEMIAN CLUB" by "her own deliberate choice of a change of position in foggy weather," had laid herself open to the peril which caused her to violate a statutory rule, she could not justify herself for anchoring where she did by the necessity for doing so which arose when, because of the density of the redescending fog, her master no longer knew where he was. The "BOHEMIAN CLUB'S" "*particular fault*", said the majority of the Court below, was an "*unjustifiable violation of a statute*" (R. p. 121) and to support that conclusion the majority cited the decision of the Circuit Court of Appeals for the Second Circuit in *The City of Birmingham,* 138 Fed. 555, cert. den. 199 U. S. 607, and the decision of the District Court for the Eastern District of New York in *The Lehigh,* 15 Fed. Supp. 425, affirmed 84 Fed. (2d) 1002 (C. C. A. 2). In both of these cases, however, it should be particularly noted that the vessel charged with a violation of the Act *was under no necessity for anchoring where she did.* Thus:

In *The City of Birmingham, supra,* the Court held (italics supplied):

"The Courts should not encourage laxity and shiftlessness by rewarding a master who places his craft in a position of danger *simply because it is too much trouble* to place her in a position of safety";

and in denying a petition for a rehearing the Court said (italics supplied):

> "Irrespective of the statute, the dredge was at fault in anchoring where she did at night, when there was *nothing to prevent her* from removing to a position where it would have been impossible for steamers to have reached her."

Similarly, in *The Lehigh, supra,* the District Court for the Eastern District of New York, held (italics supplied):

> "The fact that the fog came up suddenly did not justify the 'BARWICK' in anchoring immediately, but it was her duty to seek proper anchorage. *Such an anchorage was available.*"

The provisions of the Act of March 3, 1899, are, manifestly, in aid of commerce and navigation; and therefore, we respectfully submit, the Act should be interpreted and applied with due regard to the fundamental rule of navigation which requires a navigator, when confronted with a situation which he believes to be one of danger, to inaugurate such measures of safety as he, in the exercise of his judgment as an experienced navigator, may deem to be necessary and appropriate; and that when he has done so, he is not chargeable with negligence unless his decision is one which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances shown:

The Clarence L. Blakeslee, 243 Fed. 365 (C. C. A. 2);
The A. P. Skidmore, 115 Fed. 791 (C. C. A. 2);
The Battler, 72 Fed. 537 (C. C. A. 3); cert. den. 163 U. S. 697;
The Garden City, 127 Fed. 298 (C. C. A. 6).

In the instant case, the master of the "BOHEMIAN CLUB", when he found that he was anchored in a position where he would incur the danger of fouling the Buoy 2-D, if unable to proceed before the change in the tide, was confronted with a situation in which his only alternatives were to remain where he was and thereby incur the risk of fouling the buoy, or to move his vessel away to a position of greater safety while the opportunity presented itself. It was a situation in which, under the prevailing conditions, there was little time for deliberation; and when he concluded to move his vessel away he exercised the judgment of an experienced master who had been licensed for all oceans, and for vessels of any tonnage, and who also held a first class pilot's license for the Delaware Bay and River. The District Court held that his decision was a "reasonable" one (R. p. 109), and the learned dissenting Judge of the Court below said (R. p. 123) that in moving his vessel to avoid the buoy he had "acted prudently. He took his vessel out of a position of positive danger while he could do so." There was no evidence to support any finding to the contrary; and in reaching the conclusion that he was, nevertheless, guilty of a *statutory fault*, the majority of the Court below construed and applied the provisions of the Act of March 3, 1899, in a manner which, we respectfully submit, is not in accord with the legislative intent, and is opposed by every consideration which has induced the Federal courts, without exception, to give the Act a liberal construction as an aid to commerce and navigation. The learned dissenting Judge was moved to say in his dissenting opinion sur rehearing (R. p. 134) that the majority had announced a rule of navigation which is a "very novel rule"; a rule which "misinterprets the Act of March 3, 1899;" which

"substitutes the court's knowledge post the event for a master's judgment exercised reasonably in an emergency"; which "renders navigation more difficult, for a vessel once anchored because of fog must remain at its first anchorage even if it be a dangerous position, until the fog has lifted, not momentarily, but completely". He further said: "I think it is unfortunate that this jurisdiction, which includes within its territorial limits one of the great rivers of the country, should embrace such a rule."

We respectfully submit, moreover, that the decision rendered by the majority of the Court below not only brings into question the correctness of the interpretation of the Act announced by the Circuit Court of Appeals for the Fourth Circuit in the CITY OF NORFOLK, *supra*, which the majority of the Court below held was *a dictum;* but also, because of the very forceful opinion filed by the dissenting Judge, creates a substantial doubt as to the rule of navigation prevailing in the Third Circuit itself. The Circuit Court of Appeals for the Third Circuit presently comprises four judges; and since only two of them have concurred in the majority opinion filed in the instant case, a doubt necessarily arises as to whether the rule of navigation announced by them will be accepted by the Court as the law of the forum should the question again arise when the Court comprises a different personnel.

Any doubt or uncertainty as to the requirements of the Act, in any given situation, we respectfully submit, must necessarily lead to hesitation, doubt and indecision on the part of a navigator when suddenly confronted with a similar situation in time of fog; and nothing is more conducive to a marine disaster than indecision on the part of a navigator at a moment of danger. It is imperative, we respectfully submit, in the interest of safety, that the rules of

navigation be clear and precise, and that they be interpreted by the Courts in such an unmistakable manner that there can be no doubt, in any given situation, as to what the law requires.

In *Belden v. Chase*, 150 U. S. 674, 699, this Court said (italics supplied):

> "Masters are bound to obey the rules *and entitled to rely on the assumption that they will be obeyed*, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules."

The master of the "BOHEMIAN CLUB", accordingly, was entitled to assume that any vessel under way would comply with the law, and would, in accordance with the rule of law declared by this Court in *The Chattahoochee*, 173 U. S. 540, 548, proceed at such a rate of speed as to be able, upon sighting another vessel, to stop in time to avoid a collision. When, therefore, he concluded to move his vessel away from the buoy to a position of greater safety, he was under no obligation to be solicitous over the possibility that if, because of the unsettled weather conditions, he might again be obliged to anchor before completing his manoeuver, another vessel, approaching in an unlawful manner, i. e. at an excessive rate of speed, as did the "LAURA MAERSK", might come into collision with him. The doubt to which the decision rendered by the majority of the Court below has now given rise, however, is whether a master, confronted with a situation of danger, ought to treat the possibility that a vessel proceeding in an unlawful manner may come into collision with him as "a subject of solicitude" rather than the safety of his own vessel. The interpretation placed by the learned dissenting Judge upon the rule of navigation announced by the majority of

the Court below is that "a vessel in a fixed position of known danger in a narrow channel", can move away only "at peril of being held to be negligent." Such a rule of navigation is so opposed to the basic consideration which underlies every rule of navigation as to call, we respectfully submit, for a review by your Honorable Court. The rules of navigation are designed to promote safety in the furtherance of commerce and navigation; and any rule of navigation which discourages a master from instituting such measures of safety as he may regard as essential for the safety of his own vessel, when he can do so without endangering any other vessel, assuming always that such other vessel is herself being navigated with a proper regard for the law, cannot, we respectfully submit, be reconciled with what has heretofore been regarded as a master's obligation when confronted with a situation of danger. The Court below was unanimous in finding that the "LAURA MAERSK" was at fault for her excessive speed, and the majority of the Court did not except to the finding of the learned trial Judge (Conclusion of law No. 3; R. p. 112) that: "The measures required of a vessel at anchor in fog were taken by those in charge of the 'BOHEMIAN CLUB' after it anchored at 10:18 A. M." They held that the "particular fault" of the "BOHEMIAN CLUB" was "a statutory fault", in that where she anchored after 10:18 A. M., she obstructed the passage of other vessels.

The facts in the instant case therefore present a situation which brings into immediate question the intendment of the Act of March 3, 1899, which has never been, but which should be, we respectfully submit, for the several reasons herein discussed, be construed by your Honorable Court on a review of this case.

Point II.

The Conclusion of the Majority of the Court Below That the Master of The "Bohemian Club" Was Guilty of a Statutory Fault Was Induced by a Misapprehension of the Uncontroverted Facts in the Case.

As stated in our petition, under the statement of the issues involved, the channel on the Bulkhead Bar Range of the Delaware River where the "BOHEMIAN CLUB" was anchored is 1200 feet wide—400 feet wide to the eastward of the range line and 800 feet wide to the westward thereof (Findings of Fact Nos. 11 and 12; R. p. 104). The course up the Bulkhead Bar Range is 9 degrees true (R. p. 17a). When her anchor was lifted, at about 10 A. M., preparatory to shifting her position, the "BOHEMIAN CLUB" had steadied on a heading of 30 degrees (Finding of Fact No. 10, R. p. 104); and she was, therefore, at an angle of 21 degrees (R. p. 17a) with the range line. At the time of the collision her heading was between 26 and 30 degrees (Finding of Fact No. 21; R. p. 105); and she was therefore at approximately the same angle with the range line as she had been before she was moved. The only difference in her position was that, at the time of the collision, her bow was on the range line with her stern tailing to the westward; whereas before she was moved she was canted across the channel on the easterly side of the range line, with her stern "near to or over the range line", as the learned dissenting Judge said (R. p. 133).

Notwithstanding these uncontroverted facts, the majority of the Court below were of the opinion that the "BOHEMIAN CLUB" in the position where she was first anchored at 7.41 A. M. did not obstruct the passage of other vessels, and based that conclusion upon the fact that, before

she was shifted, three other vessels *proceeding downstream*, had passed her in safety. In reaching that conclusion the majority of the Court overlooked, apparently, that it was the duty of these three vessels to keep to their starboard hand side of the channel, i. e. to the westward of the range line, in accordance with Article 25 of the Inland Rules of Navigation, Act of June 7, 1897, c. 4, sec. 1, 30 Stat. 101; 33 U. S. Code Sec. 210, which reads:

> "In narrow channels, every steam vessel shall, when it is safe and practical, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel."

Obviously, had these three vessel been proceeding *upstream*, the "BOHEMIAN CLUB," while canted across the easterly side of the channel, would have prevented or obstructed their passage. The learned dissenting Judge in his opinion sur rehearing said (R. p. 133):

> "There is but one reason why the majority conclude that the 'BOHEMIAN CLUB' was not in a position of danger in the east part of the channel and was in a position of danger in the west part of the channel. The reason is that three vessels bound *downstream* passed the 'BOHEMIAN CLUB' while she was on the east side of the channel. They passed her, as would be expected, without mishap. If a vessel had attempted to move upstream on the east side of the range line (as negligently as did the 'LAURA MAERSK' moving downstream) while the 'BOHEMIAN CLUB' was anchored in her first position inevitably a collision would have occurred."

Whether a vessel is anchored in the channel of a navigable river so as to prevent or obstruct the passage of other vessels is a question which must be determined by her posi-

tion in the channel *when she anchors*, and not by the happening of some subsequent event, i. e. in the instant case, that at approximately 11.37 A. M. the "LAURA MAERSK", while being unlawfully navigated, came into collision with the "BOHEMIAN CLUB" at the point where she was then anchored; and since the "BOHEMIAN CLUB" was no less of an obstruction to the passage of other vessels while anchored on the easterly side of the channel than she subsequently was when anchored on the westerly side of the channel, the change in her position was an immaterial circumstance. Her length, 435 feet (Finding of Fact No. 3; R. p. 103) and the channel width—1200 feet (Findings of Fact Nos. 11 and 12; R. p. 104) both rendered it impossible for her to anchor at any point within the channel limits without presenting herself as an obstruction to other vessels lawfully under way.

In a footnote to their opinion sur rehearing (R. p. 131) the majority of the Court below directed attention to the testimony of the master of the "WHITE FLASH"—one of the three ships which passed downstream in safety while the "BOHEMIAN CLUB" was at her first anchorage—who stated that it was his intention to anchor, as soon as he could, "off the ranges", so that he would be "out of the channel of anything that was moving." That, said the majority, "was precisely what the master of the 'BOHEMIAN CLUB' did not do when he changed his place of anchorage." Apparently, therefore, the majority of the Court below were of the opinion that the master of the "BOHEMIAN CLUB" ought to have done what the master of the "WHITE FLASH" intended to do, i. e. anchor outside the channel limits, despite the fact that when the "BOHEMIAN CLUB" anchored, the redescent of the fog had blotted out all indicia of position, and that it was for precisely that reason—because he

did not know where he was, or where he would go if he kept under way, that the master of the "BOHEMIAN CLUB" anchored his vessel at the point where she then was. The "WHITE FLASH," we would add, was a small vessel, 200 feet in length (R. p. 28a), with a draft of only 9'6" (R. p. 28a); whereas the "BOHEMIAN CLUB" was 435 feet in length, and drew 27' forward, and 27'1" aft (Findings of Fact Nos. 3 and 5; R. p. 103). That the length and the draft of the "BOHEMIAN CLUB" were such that she could not have anchored outside the channel limits, even if she could have found her way and determined her position by means of the channel buoy, was conclusively pointed out by the learned trial judge (R. p. 110).

What appears to have been a misapprehension of the majority of the Court below with respect to the uncontroverted facts in the case may well have been a circumstance, therefore, which induced them to hold that the master of the "BOHEMIAN CLUB" had been guilty of a statutory fault. *But even assuming for the purposes of the argument that the* "BOHEMIAN CLUB" *where she was first anchored was not an obstruction to navigation, then the question which still remains is whether the provisions of the Act of March 3, 1899, are so rigorous and inexorable that a navigator who is compelled to anchor in the channel of a river, because of fog, must remain where he is, notwithstanding that he subsequently finds his position to be one of danger, and can venture to move his vessel to a position of safety only at the peril of being found guilty of a statutory fault, if, through circumstances beyond his control, i. e., a sudden redescent of the fog which leaves him without any indicia of position, he is again compelled to anchor at a point where his vessel is more of an obstruction to other vessels than she had previously been.*

CONCLUSION.

For the reasons stated, we therefore respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX TO BRIEF.

Act of March 3, 1899, c. 425, sec. 15, 30 Stat. 1152; U. S. C. Title 33, Sec. 409:

> "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidently or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for."